AFFIN BANK BHD

v.

JOSEPH THAMBIRAJAH

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUIT NO: D5 (D7) (D9) (D4)-22-1534-92]
30 OCTOBER 2003

CONTRACT: *Guarantee - Consideration - Continuing guarantees - Whether consideration existed - Past consideration - Whether valid and binding in law*

CONTRACT: *Guarantee - Guarantor - Whether cause of action against guarantor affected by summary judgment obtained in earlier suit against co-guarantors - Whether guarantors entered guarantees "jointly" or "jointly and severally"*

CONTRACT: *Guarantee - Demand for payment - Notices of demand - "Principal debtor clause" in guarantees - Whether inclusion of clause obviated necessity for prior demand - Service of notices - Whether valid*

CONTRACT: *Guarantee - Limitation of time for demand under guarantee - Whether present suit time-barred - Limitation Act 1953, s. 6(1)*

LIMITATION: *Guarantee - Guarantee on overdraft - Accrual of cause of action - Whether suit time-barred - Limitation Act 1953, s. 6(1)*

CIVIL PROCEDURE: *Estoppel - Issue estoppel - Withdrawal of earlier suit with leave of court - Whether plaintiff barred from bringing present suit - Rules of the High Court 1980, O. 21 rr. 3(1), 4*

CONTRACT: *Guarantee - Discharge - Whether guarantor ought to be discharged from liability under guarantees - Contracts Act 1950, ss. 92, 94*

CONTRACT: *Guarantee - Overdraft facilities - Compound interest - Whether terms of guarantees contravened - Civil Law Act 1956, s. 11(a)*

BANKING: *Securities for advances - Guarantee - Guarantees for overdraft facilities - Compound interest - Whether terms of guarantees contravened - Civil Law Act 1956, s. 11(a)*

EVIDENCE: *Documentary evidence - Bankers' Books (Evidence) Act 1949 - Secondary evidence - Summary accounts of ledgers - Whether admissible - Evidence Act 1950, s. 65(1)(c), (2)(a) - Bankers' Books (Evidence) Act 1949, ss. 4, 5*

The plaintiff, which had availed loan and overdraft facilities to the principal borrower, filed a civil suit against the principal borrower and the respective guarantors to recover the loan availed ('the first suit'). The defendant (in the present case), who was the 4th defendant in the first suit, together with two other guarantors had signed a letter of guarantee whereby they jointly and severally guaranteed the payment of the said loan. The plaintiff obtained summary judgments under O. 14 of the Rules of the High Court 1980 ('RHC') against the principal borrower and the other two guarantors. The plaintiff later filed an application to withdraw the action against the defendant; this application was granted by the learned senior assistant registrar on the ground that the said action was "an action prematurely commenced without a proper and valid notice of demand made on the 4th defendant". Subsequently, the plaintiff issued fresh letters of demand to the defendant dated 4 May 1992 and 10 June 1992. On 23 November 1992, the plaintiff filed a fresh action against the defendant.

The issues requiring determination were: (i) whether the guarantees signed by the defendant were valid and enforceable; (ii) whether the plaintiff had a valid cause of action against the defendant despite the fact that summary judgments had been obtained against the other two guarantors in the first suit; (iii) whether a valid and proper demand had been made by the plaintiff against the defendant; (iv) whether the present suit against the defendant was time-barred by limitation; (v) whether the plaintiff was estopped from proceeding with the present suit as the first suit against the defendant had been withdrawn; (vi) whether the defendant ought to be discharged from the guarantees pursuant to ss. 92 and 94 of the Contracts Act 1950 ('CA'); and (vii) whether the plaintiff had failed to prove the proper amount of its claim.

Held (allowing the plaintiff's claim):

[1] On the facts, the guarantees in question were continuing guarantees and were given in consideration of the plaintiff opening or continuing an account with the principal borrower. The guarantees related to the loan facilities existing at the time as well as facilities to be made in the future. There was clearly consideration for the guarantees and even if it was past consideration, the guarantees signed by the defendant were still valid and binding in law. (pp 208 c, e & 210 d)

[2] The summary judgment obtained against the other two guarantors in the first suit did not in any way affect the cause of action against the defendant in the present case. The guarantees were entered by all the guarantors "jointly and severally"; therefore, the basis of the plaintiff's claim on the cause of action against all the three guarantors were based

on their obligations, which were not merely "jointly", but "jointly and severally". That was the basis for the cause of action against the guarantors in the first suit and the present suit. (pp 210 h, 211 a & 213 c)

[3] The plaintiff need not have sent any notice of demand to the defendant by virtue of the presence of cl. 14 *ie*, the "principal debtor clause" in the guarantees since such a clause obviated the necessity for a creditor to make a demand to a guarantor as the guarantee was no longer a collateral agreement and the issuance of the writ was a demand in itself. (p 214 c)

[3a] Although the plaintiff issued two notices of demand, the defendant admitted to only receiving the earlier one despite the fact that they were both sent to the last-known address of the defendant's place of business. By virtue of cl. 10 of the guarantees, the said notice "so sent shall be deemed to have been served on the defendant on the day following that of which it is posted". As there was no convincing reason as to why the defendant had not received the second notice of demand, cl. 10 was not rebutted and this court was satisfied that both the notices had been duly served or deemed served under the guarantees, and were good and valid. (pp 215 f & 216 a-c)

[4] The plaintiff had served two notices of demand to the defendant dated 4 May 1992 (as principal debtor) and 10 June 1992 (as guarantor) which were found to be good and valid for the purpose of the present suit. Therefore, the cause of action accrued against the defendant on those two dates respectively. Since the present suit was filed on 23 November 1992, it was still within the six-year period under s. 6(1) of the Limitation Act 1953 and not time-barred. (p 217 d-e)

[5] The order dated 7 November 1992 was very clear that the action was withdrawn because it was "prematurely commenced" against the defendant. Although the words "with liberty to file afresh" were not stated in the court order, this did not prevent the plaintiff from re-filing the present suit after a proper demand had been made on the defendant. Pursuant to O. 21 rr. 3(1) and 4 of the RHC, the plaintiff was not barred from bringing the present suit against the defendant even though the first suit was withdrawn with the leave of the court. (pp 217 h, 218 b-d & 219 f)

[6] Sections 92 and 94 of the CA did not apply to the facts of the present case because the plaintiff did not do any act that was inconsistent with the rights of the defendant. The plaintiff had already taken a registered fixed and floating charge over all the assets of the principal borrower by way of a debenture, which was also created as security. There was

no need for the plaintiff to endorse its interest on the registration cards of the equipment and vehicles (fixed assets offered by the principal borrower) with the Jabatan Pengangkutan Jalan Malaysia as this was not a hire-purchase transaction. The plaintiff's interest was already protected under the debenture and the defendant was not discharged from his liability under the guarantees. (pp 220 f, 221 a-b & 222 a)

[7] It was a universal custom of bankers to charge compound interest on an overdraft facility granted to a customer. The principal debtor, as a customer, had acquiesced to the system under which compound interest was charged, and the defendant, at all material times as general manager or finance director of the principal borrower, never queried or confronted the plaintiff on the issue of compound interest. As such, the total claim of RM3,375,354.98 was correct and valid, and there was no contravention of the terms of the guarantees or s. 11(a) of the Civil Law Act 1956. (p 224 b-c)

[7a] The defendant's complaint, on the same issue, that the plaintiff had failed to produce missing original ledgers for the two-year period did not in any way affect the plaintiff's case, as the summary accounts of those ledgers had been tendered in court by the plaintiff and confirmed by the plaintiff's witness that they were examined with the missing original entry and found to be correct. Hence, they were admissible in evidence by virtue of s. 65(1)(c) and (2)(a) of the Evidence Act 1950 as well as under ss. 4 and 5 of the Bankers' Books (Evidence) Act 1949. (p 224 d-g)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(foll)***

Arab Malaysian Finance Bhd v. Kemajuan Mugiland Sdn Bhd & Ors (Civil Suit No: C3236 of 1985) (Unreported) ***(refd)***

Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 HC ***(dist)***

Credit Corporation (M) Bhd v. Choi Seng & Anor (Civil Suit No: C2-24-5650-86) (Unreported) ***(refd)***

Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 ***(foll)***

Heng Cheng Swee v. Bangkok Bank Ltd [1976] 1 MLJ 256 ***(foll)***

Hong Leong Bank Bhd v. Percetakan Melati Sdn Bhd [2002] 4 MLJ 70 ***(dist)***

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(foll)***

Mok Hin Wah & Ors v. United Malayan Banking Corporation Bhd [1987] 2 MLJ 610 ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank [1989] 3 MLJ 155 ***(refd)***

Parr v. Snell [1923] 1 KBD 1 ***(dist)***

Perwira Habib Bank Malaysia Bhd v. Floorwall Furnishing Sdn Bhd & Ors (Civil Suit No: C23-2092-86) (Unreported) ***(refd)***

Public Bank Bhd v. Nik Chee Kok [2003] 2 MLJ 455 ***(foll)***
The Kronprinz, The Owners of the Cargo of the "Kronprinz" v. The Owners of the "Kronprinz" – the Ardandhu (1998) – HL 256 ***(foll)***
United Malayan Banking Corporation Bhd v. Datin Theresah Abdullah [1994] 4 CLJ 1074 HC ***(refd)***

Legislation referred to:
Bankers' Books (Evidence) Act 1949, ss. 4, 5
Civil Law Act 1956, s. 11(a)
Contracts Act 1950, ss. 2(d), 92, 94
Evidence Act 1950, s. 65(1)(c), (2)(a)
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 14, O. 21 rr. 3(1), 4

Other source(s) referred to:
Malaysian High Court Practice, MLJ, para 15.4.7
Mallal's Supreme Court Practice, 2nd edn, p 263
Rules of the Supreme Court – White Book, p 365

For the plaintiff - Arunachalam Ramiah (Josephine Robert); M/s Arun & Co
For the defendant - Ramdas Tikamdas; M/s Siva, Ram & Assocs

Reported by Suresh Nathan

JUDGMENT

Brief Facts

The plaintiff availed loan facilities to the principal borrower, namely Pembinaan Damo Sdn Bhd for a total sum of RM749,000 *vide* a letter of offer dated 12 January 1978. On 6 February 1978, a sum of RM282,000 was released to the principal borrower. Further, on 15 February 1978 an overdraft facility of RM331,862.36 was released to the principal borrower. The defendant together with two others namely Subhas Damodaran and Prakash Damodaran stood as guarantors to the loan availed to the principal borrower. A letter of guarantee was signed on 16 February 1978 whereby the defendant and two others, jointly and severally guaranteed the payment of the said loan for a sum of RM749,000 by the principal borrower.

Another letter of guarantee (of the same date) was also signed by the same guarantors, jointly and severally in respect of the additional loan of RM119,000 granted by the plaintiff to the principal borrower, *vide* a letter of offer dated 1 March 1978. The principal borrower failed to honour the loan agreements as per the letter of offer.

On 23 December 1980 the plaintiff issued letters of demand against the principal borrower and all the guarantors. On 11 March 1981, the plaintiff filed a civil suit *vide* Civil Suit No C 242-81 against the principal borrower and the guarantors, to recover the loan availed (first suit). The defendant (in the present case) was the fourth defendant in the first suit.

On 15 October 1981, the plaintiff obtained summary judgment under O. 14 of the RHC 1980 against the other two guarantors namely Subhas Damodaran and Prakesh Damodaran for the sum of RM868,000 together with interest of 11% p.a. from 23 December 1980 to date of realisation. On 22 May 1985, the plaintiff obtained another summary judgment under O. 14 of the RHC 1980, against the principal borrower for the sum of RM1,061,149.58 together with interest of 11% p.a. from 1 February 1981 to date of realisation.

On 30 March 1991 the defendant (who was the fourth defendant in the first suit) filed an application to strike off the plaintiff's statement of claim in the first suit for want of prosecution (encl. 123 in the first suit).

On 4 June 1991, the plaintiff filed an application to withdraw the action against the defendant (fourth defendant in the first suit) *vide* encl. 126 of the first suit. On 7 November 1991, the learned SAR granted the plaintiff's application (encl. 126) on the ground that the said action against the defendant "being an action prematurely commenced without a proper and valid notice of demand made on the fourth defendant".

On the same date the defendant (fourth defendant in the first suit) withdrew his application (encl. 123 of the first suit).

Subsequent to that, the plaintiff's solicitors issued fresh letters of demand to the defendant (fourth defendant in the first suit) dated 4 May 1992 and 10 June 1992 for the sum of RM3,375,354.98. On 23 November 1992 the plaintiff filed a fresh action (the present action) against the defendant. The plaintiff tried to apply for summary judgment against the defendant but did not succeed as the court found that there were triable issues.

In his defence the defendant raised the following defences, namely:

(a) that the guarantees are not enforceable against the defendant as there was no consideration given by the plaintiff and that if there was consideration, it is past consideration;

(b) that as a matter of law, the summary judgment dated 15 October 1981 obtained by the plaintiff against the other two guarantors namely Subhas Damodaran and Prakash Damodaran in the first suit was on a joint basis and therefore the cause of action against the defendant has been merged in the said summary judgment and the plaintiff has no cause of action in law to proceed against the defendant in the present action;

(c) that the only notice of demand tendered in court is the one dated 4 May 1992 and it does not refer to any guarantee at all and it is patently misleading in stating that the defendant was "availed loan facilities" when in actual fact he clearly did not. Therefore, the said notice of demand commenced cause of action against the defendant. The defendant contends that the other purported notice of demand dated 10 June 1992 is a disputed document and has not been converted into a court exhibit;

(d) the defendant further contends that the plaintiff's present action, which was filed on 23 November 1992 is barred by limitation pursuant to s. 6(1) of the Limitation Act 1953 on the ground that the cause of action arose on 23 December 1980 when the plaintiff's first notice of demand to the defendant was issued, and the present suit was filed after approximately 12 years (ie, 23 November 1992);

(e) the defendant further contends that the plaintiff is precluded by issue estoppel from filing the present action on the ground that the first suit against the defendant was withdrawn *vide* court order dated 7 November 1991 without the words "with liberty";

(f) the defendant ought to be discharged from the guarantee pursuant to ss. 92 and 94 of the Contracts Act 1950;

(g) the plaintiff has failed to prove the proper amount of their claims.

Issues To Be Determined

The issues to be determined by the court are as follows, namely:

(a) whether the guarantees signed by the defendant are valid and enforceable;

(b) whether the plaintiff has a valid cause of action against the defendant despite the fact that summary judgments under O. 14 of the RHC 1980 have been obtained against the other two guarantors in the first suit earlier;

(c) whether a valid and proper demand had been made by the plaintiff against the defendant;

(d) whether the present suit against the defendant is time barred by limitation;

(e) whether the plaintiff is estopped from proceeding with the present suit as the first suit against the defendant has been withdrawn;

(f) whether the defendant ought to be discharged from the guarantees pursuant to ss. 92 and 94 of the Contracts Act 1950;

(g) whether the plaintiff had failed to prove the proper amount of their claims.

Findings Of The Court

The court shall now deal with all the issues raised one by one.

Issue (a)

In para. 8(ii) and (iii) of the statement of defence, the defendant states that there is no consideration given by the plaintiff for the guarantees signed by the defendant and that if there was consideration it is past consideration.

This line of defence by the defendant is clearly misconceived. The opening words of both the guarantees clearly indicate that the defendant signed the guarantees "in consideration of your (the plaintiff) opening or continuing an account ...". Clearly there was consideration for the guarantee. The said consideration given is not past consideration. The guarantees in question are continuing guarantees and the guarantees were given in consideration of the plaintiff opening or continuing an account with the principal borrower. Even in his cross-examination the defendant has indicated that the guarantees that he signed were given in consideration of the plaintiff opening or continuing an account with the principal borrower. Therefore the guarantees signed by the defendant are valid and binding.

Clause 1(i)(ii) and (iii) of the guarantees state that the guarantor "will pay on demand all moneys which are now or may during the operation of this agreement be owing to you". This clause clearly shows that the guarantees signed by the defendant were continuing guarantees and valid in law. The guarantees relate to the loan facilities existing at the time when the defendant signed them as well as to facilities to be made in the future.

The decision of the Federal Court in *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 256 clearly supports this findings. In that case *(Heng Cheng Swee)* Suffian LP held:

> The appellant in this case had signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future. The guarantee was not limited only to the amount of the overdraft existing on the date of the letter of guarantee. There was also a provision in the letter of guarantee empowering the bank to make further advances to the company.
>
> The letter of guarantee stated that it was to be in addition to any collateral or other security held or to be held by the bank.
>
> The consideration in the guarantee in question is stated clearly in cl. 1 thereof as follows:

> In consideration of the Bangkok Bank Ltd. (hereinafter called the Bank) making or continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank may think fit to Malaysian Timber & Granite Products Ltd of Nos. 121-1B, Jalan Imbi, Kuala Lumpur (hereinafter called "the principal) I, the undersigned, Heng Cheng Swee, Advocates 8c Solicitors, Kuala Lumpur, hereby jointly and severally ..."

> With all due respect I do not agree with Mr Sethu's arguments. The defendant has signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future. There is not a word in the guarantee limiting the guarantee only to the amount of the overdraft existing on the date of the letter of guarantee.

The defendant may argue that the guarantees relate to past consideration on the ground that some of the loan and overdraft were disbursed to the principal borrower even before the guarantees were signed. However, it is settled law that past consideration is valid in law to bind the guarantor.

Clause 1(i)(ii)(iii) of the guarantees clearly provides that guarantor "will pay on demand all moneys which are now owing to you".

These words clearly indicate that the guarantees cover the loan or overdraft granted or moneys owing which were in existence when the guarantees were signed and executed. The decision in *Public Bank Bhd v. Nik Chee Kok @ Nik Soo Kok* [2003] 4 AMR 53; [2003] 2 MLJ 455 has dealt extensively on that same issue – ie, whether past consideration is valid and binding in law. In that case, the court held as follows:

> The legal principle relating to past consideration was established as early as 1615 in the case of *Lampleigh v. Braithwait* [1615] Hobart 105, where it was held:
>
> > First ... a mere voluntary courtesie will not have a consideration to uphold an asumpsit. But if that courtesie were moved by a suit or request of the party that gives the asumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.
>
> This principle was adopted by the Privy Council in the case of *Pao On v. Lau Yiu Long* [1980] AC 614, where Lord Seaman held that:

an act done before the giving of a promise could be valid consideration for that promise if the act had been done at the promisor's request.

In our Contracts Act 1950, s. 2(d) provides:

When, at the desire of the promisor, the promise or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

In *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295, the Supreme Court has held that the use of the words 'has done or abstained from doing as appearing in s. 2(d) of the Contracts Act 1950, shows that our Contracts Act 1950, recognizes the principle laid down in *Lampleigh v. Braithwait* (1615), i.e. that past consideration is good consideration if it comes at the request of the promissory.

Based on the above authorities, this court rules that, in the present case, the guarantee was valid even though it relates to past consideration.

Applying those authorities to the present case, the court has no hesitation to hold that the guarantees signed by the defendant dated 16 February 1978 are valid and enforceable and binding in law.

Issue (b)

The defendant argues that the guarantees in question expressly state that they were entered by the (3) guarantors "jointly and severally". However, the words "jointly and severally" are conspicuously missing from the prayers sought under prayer 5(b) of the statement of claim as well as from the summary judgment dated 15 October 1981 under O. 14 against the other two guarantors.

That being the case, the defendant argues that the said summary judgment dated 15 October 1981 against the other two guarantors in the first suit was on joint basis (not severally) and therefore the cause of action against the defendant has been merged in the said summary judgment and that the plaintiff has no cause of action to proceed against the defendant in the present action.

To support his argument, the defendant cited the following authorities, namely, *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 and *Hong Leong Bank Bhd v. Percetakan Melati Sdn Bhd* [2002] 4 MLJ 70.

This issue has never been pleaded by the defendant in the statement of defence. In any event, the court is satisfied that the said summary judgment obtained against the other two guarantors in the first suit, does not in any way effect the cause of action against the defendant in the present case. The opening words

of the guarantees clearly state that the guarantees were entered by all the guarantors "jointly and severally". Therefore the basis of the plaintiff's claim on the cause of action against all the three guarantors is based on their obligation "jointly and severally" as provided under the guarantees. The summary judgment given against the other two guarantors must relate to the same obligation "jointly and severally" as stipulated in the guarantees, as the said summary judgment was obtained on the strength of the same guarantees. The cases relied on by the defendant ie, *Asia Commercial Finance (M) Bhd, supra* and *Hong Leong Bank Bhd, supra,* should be confined to their own facts as both cases stand on their own factual matrix without any or reference to previous cases decided in this country on the same principle. The learned judge in *Asia Commercial Finance* referred to a very old English case of *Parr v. Snell* [1923] 1 KBD 1. The facts of that case are clearly distinguishable from the facts of the present case, because in that case *(Parr v. Snell)* the court held that the contract was a "joint" contract, not a "joint and several" contract. Whereas in our present case, there is no dispute from the guarantees that the guarantees were "joint and several" guarantees. In that case, *(Parr v. Snell)* Lord Sterndale MR held:

> I think this appeal must succeed. The point taken is that this was a joint contract; and being a joint contract, there has been a final judgment signed against two of the three joint contractors, to proceed against the other. I cannot agree with the learned judge that this was a joint and several contract. I think this was a joint one; it is only necessary to read it in order to see that.
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> The technical rule of law which we have to apply is this: that where there are joint contractors if judgment is signed against one the other is discharged ...
>
> The first question here is: Is this a joint contract? Because, if it is not, the technical rule does not apply.

However, we have a Federal Court decision in *Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co* [1978] 2 MLJ 101 which supports the court findings that the summary judgment in the first suit obtained against the other two guarantors based on guarantees where the obligations were "joint and several", does not in any way effect the cause of action against the defendant in the present suit.

In that case *(Hagemeyer Trading Co (M) Sdn Bhd), supra,* Chang Min Tat FJ held as follows:

> Swinfen Eady LJ held that where the obligation binds two or more persons severally, a judgment against one is no bar to an action against the other. He first quoted from Bayley B in *Lechmere v. Flecther* at p. 635 that the law is as thus stated:

> There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor; you are still at liberty to sue the other; unless indeed the judgment has been satisfied; but so long as any part of the demand remains due, you are at liberty to sue the other; notwithstanding you have obtained judgment against one. This, I think, establishes the principle that where there is a joint obligation and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other.

He then went on to say:

> If therefore, where the obligations are several, a judgment in an action against one person is no bar to an action against another I see no ground upon which it can be maintained that an action brought in error against a fictitious person or against a person not under any liability is a bar to an action against the person alleged to be really liable. The cause of action is not the same.

The same principle was also followed by Low Hop Bing JC (as he then was) in *United Malayan Banking Corporation Bhd v. Datin Theresah bte Abdullah* [1994] 4 CLJ 1074, when he held:

> In deciding on this question, I have taken into consideration the fact that the guarantee is a joint and several guarantee, wherein the guarantors' liability is joint and several.
>
> Where two or more persons are jointly and severally liable under any contract e.g. a contract of guarantee, the liability is not liability in the alternative but it is joint and several. In the event, it is no bar to an action against one defendant even if the plaintiff has obtained judgment against the other defendants; *Paterson, Simons & Co (M) Sdn Bhd v. Pembangunan Leasing Corporation Sdn Bhd & 2 Ors* [1989] 2 CLJ 209.
>
> The plaintiff has in the instant case given the reason for not seeking and obtaining judgment against the deceased although judgment was sought and obtained against all the other co-guarantors. The reason was that there was no cause of action against him on June 6, 1985, when no notice of demand was served on him before he died – this being a demand guarantee under which no cause of action could ever arise unless and until the notice of demand has been served on the guarantor.
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> Further, when the plaintiff filed the present suit, the plaintiff has elected to proceed with the present suit and consequently not to proceed or has abandoned the previous suit: *Bank of Canton v. Dart Sum Timber (Pte) Ltd* [1978] 2 MLJ 5.

> By reason of the foregoing authorities, I hold that the issues are plain and obvious which leave no room for controversy, dispute or argument.

Support for the above findings is also found in *Malaysian High Court Practice,* abridged edn (MLJ) para. 15.4.7 which says:

> Whereas in the case of co-promiso, where their liability under the Contracts Act 1950 (Act 136) is joint and several, a judgment against one will not debar an action against the co-promisor.

In our present case, it is not disputed that the obligations of all the guarantors as provided in the letters of guarantees are "jointly and severally". That is the basis for the cause of action against the guarantors in the first suit and the present suit. They are not a mere "jointly" guarantees. There are "jointly and severally". Therefore the technical rule as found in *Parr v. Snell*, does not apply.

Issue (c)

The defendant contends that the plaintiff's statement of claim does not particularise the notice of demand. According to the defendant, the only notice of demand tendered in court as an exhibit is the notice of demand dated 4 May 1992. The other purported notice of demand dated 10 June 1992 is a disputed document and has not been converted into a court exhibit. The notice of demand dated 4 May 1992 states:

> We are instructed that you were availed loan facilities at your request by our clients and that you had not adjusted or repaid the outstanding together with arrears inclusive of interest in the sum of RM3,375,354.98.

The defendant contends that the said notice of demand does not refer to any guarantee at all and it is patently misleading in stating that the defendant was "availed loan facilities" when in actual fact he clearly was not. Therefore, the defendant submitted that the said notice of demand is invalid and defective and cannot properly commence a cause of action against the defendant.

There are two notices of demand issued by the plaintiff against the defendant ie, one dated 4 May 1992 and the other one dated 10 June 1992. The notice of demand dated 4 May 1992 was issued to the defendant as "principal debtor" while the one dated 10 June 1992 was issued to the defendant as "guarantor". Both the notices of demand were sent to the same address ie, the last known place of business of the defendant at c/o Sports Toto (M) Sdn Bhd, Level 10, Shahzan Prudential Tower No 30, Jalan Sultan Ismail, 50250 Kuala Lumpur,. The defendant admits having received the first notice of demand dated 4 May 1992 but not the second one dated 10 June 1992 even though both the notices

were sent to the same address and the defendant personally confirmed during his cross-examination that throughout the year 1992 he was working at Sports Toto (M) Sdn Bhd at the same address.

The notice of demand dated 4 May 1992 issued to the defendant is a demand on the defendant as a "principal debtor". This notice was issued, according to the plaintiff, because as provided under cl. 14 of the guarantees, the entire amount guaranteed for together with interest and costs can be recovered from the defendant as a sole or principal debtor. The plaintiff argues that by signing the guarantees, the defendant has agreed to be bound as a sole or principal debtor or/and as well as a guarantor *per se*.

Clause 14 of the guarantees is known as "the principal debtor clause". It is now settled law that the presence of such a clause in the guarantee obviates the necessity for a creditor to make a demand to a guarantor as the guarantee is no longer a collateral agreement and the issuance of the writ is a demand in itself (see *Perwira Habib Bank Malaysia Bhd v. Floorwall Furnishing Sdn Bhd & Ors* Civil Suit No C23-2092-86 Kuala Lumpur High Court). In that case the court ruled that the fact that the defendant there had been served with only a carbon copy of the notice was immaterial to establish his liability under the guarantee by virtue of the presence of cl. 14 – relating to "principal debtor clause" in the guarantee itself. The same ruling was made by the same judge (her Ladyship Siti Norma Yaakob J) in *Credit Corporation (M) Bhd v. Choi Seng & Anor* Civil Suit No C2-24-5650-86 Kuala Lumpur High Court, and *Arab Malaysian Finance Bhd v. Kemajuan Mugiland Sdn Bhd & Ors* Civil Suit No C3236 of 1985, Kuala Lumpur High Court.

In the first place, based on the above authorities, the court is convinced that the plaintiff need not send any notice of demand to the defendant in the present case by virtue of the presence of cl. 14 – relating to the "principal debtor clause" in the guarantees. Service of the writ and statement of claim itself on the defendant (as guarantor) is sufficient notice of such a demand having been made. However, in the present case, the plaintiff has sent the notice of demand dated 4 May 1992 identifying the defendant as the "principal debtor pursuant to the guarantees. This is a perfectly valid notice and the suit commenced against the defendant based on this notice is also actionable in law.

With regard to the second notice of demand dated 10 June 1992 which was addressed to the defendant as a guarantor, again the court is of the view that such a notice is not necessary in view of the presence of cl. 14 relating to "principal debtor clause" in the guarantees based on the above authorities cited earlier.

In any event the plaintiff has also sent the notice of demand to the defendant (as a guarantor) on 10 June 1992 to the last known place of business of the defendant at c/o Sports Toto (M) Sdn Bhd, Level 10, Shahzan Prudential Tower, No 30, Jalan Sultan Ismail, 50250 Kuala Lumpur, ie, the same address where the first notice of demand dated 4 May 1992 was sent and received by the defendant.

Clause 10 of the guarantees provides that:

> any demand for payment or any other demand or notice under this guarantee may be made by letter sent by post addressed to us (guarantors) at our address specified herein at out last known place of business ... and a demand or notice so sent shall be deemed to be served on the day following that on which it is posted.

In the present case the said notice of demand dated 10 June 1992 was sent by the plaintiff through its solicitor Messrs Arun & Co *via* AR registered post. This was confirmed by PW1 in his evidence. The defendant in his evidence confirmed that throughout the year 1992 he was working at the Sports Toto (M) Sdn Bhd at the given address. There is no dispute that at the material time, that was the place of business for the defendant. The plaintiff has complied with the provisions of cl. 10 of the guarantees by posting the said notice of demand dated 10 June 1992 by way of AR registered post to the said address.

By virtue of cl. 10 of the guarantees, the said notice so sent shall be deemed to have been served on the defendant on the day following that of which it was posted. This finding is supported by the decision of Mohamed Dzaiddin SCJ in *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1 (Supreme Court) when he held:

> Although the words "shall be deemed" in the above case considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove service of the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above.
>
> For reasons stated above, in our judgment, on the true construction of column 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal ...

The "deeming provision" under cl. 10 applies. The defendant denied having received the said notice of demand dated 10 June 1992. These are bare denials. The defendant admitted having received the earlier notice of demand dated 4 March 1992 addressed to the last known address of the defendant's place of business. The second notice of demand dated 10 June 1992 was also sent to the same address, one month after the date of the first notice of demand.

The defendant confirmed that throughout the year 1992, he was working at the same place ie, Sports Toto (M) Sdn Bhd. There is no convincing reason as to why the defendant had not received the second notice of demand. The "deeming provision" as to service under cl. 10 is not rebutted. If at all the notice of demand need to be served on the defendant, then the court is satisfied that both the notices dated 4 May 1992 and 10 June 1992 have been duly served or deemed served under the guarantees and are good and valid.

Issue (d)

The next issue is whether the present suit is time barred by limitation. The defendant argues that the present suit against him is time barred pursuant to s. 6(1) of the Limitation Act 1953 on the ground that the plaintiff's first notice of demand was issued on 23 December 1980 (when the cause of action began) and the present suit was only filed on 23 November 1992 – ie, approximately 12 years later.

Section 6(1) of the Limitation Act 1953 provides that actions founded on a contract or agreement shall not be brought after the expiration of (6) years from the date on which the cause of action accrued.

Paragraph 1 of the guarantees in question provides that the guarantors "will pay you (the plaintiff) on demand all money ...". A guarantee of this nature is known as an "on demand guarantee". It is trite law that the liability of the guarantor in this type of guarantee is based on the demand made by the creditor (plaintiff). The guarantor is only liable under the guarantee if a valid demand has been made against the guarantor. In other words, the plaintiff's cause of action against the defendant in the present case only arises upon a valid demand made against him after the principal borrower has defaulted in its payment. The Supreme Court in *Mok Hin Wah & Ors v. United Malayan Banking Corporation Bhd* [1987] 2 MLJ 610 at p. 611 has made the following rulings:

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words, under clause 1, the guarantors are to pay "on demand ...". Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing guarantor ...

see also *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank* [1989] 3 MLJ 155 (Supreme Court).

In the present case, the defendant had challenged that there was no demand made at all against him in the first suit. The plaintiff withdrew the first suit with leave of the court, on the ground that the first suit against the defendant was filed prematurely without a proper or valid notice of demand. The court order dated 7 November 1991 clearly states that:

> It is ordered that the action against the fourth defendant be and is hereby with leave withdrawn and struck off as being an action prematurely commenced without a proper or valid notice of demand made on the fourth defendant.

This clearly shows that as at 7 November 1991 when the order was granted, there was no proper or valid notice of demand made and issued by the plaintiff against the defendant (the fourth defendant in the first suit). Subsequent to the said order the plaintiff served two notices of demand to the defendant dated 4 May 1992 (as principle debtor) and 10 June 1992 (as guarantor).

The court has held earlier that these notices of demand are good and valid for the purpose of the present suit. Therefore the cause of action accrued against the defendant (as principal debtor) on 4 May 1992 and (as guarantor) on 10 June 1992.

The present suit was filed on 23 November 1992. It was still within the six (6) years period as provided under s. 6(1) of the Limitation Act 1953. It is not time barred as alleged by the defendant.

Issue (e)

The defendant contends that the plaintiff is barred from bringing the present action as the first suit was withdrawn by the plaintiff with no liberty to file afresh. The court does not agree with this contention. The first suit was withdrawn with leave of court, on the ground that it was prematurely commenced without a proper notice of demand made on the defendant. It was the defendant who first resisted the first suit stating that no proper demand was ever made on him by the plaintiff. By withdrawing the first suit on that ground, the plaintiff did not abandon the claim against the defendant. The plaintiff's claim against the defendant still exists and he is not released from the claim. The order dated 7 November 1991 is very clear that the action was withdrawn because it was "prematurely commenced" against the defendant. Although the words "with liberty to file afresh" are not stated in the court order, this does not prevent the plaintiff from bringing the present suit after a

proper demand has been made on the defendant. The court order does not prohibit the plaintiff to refile a fresh suit against the defendant, after proper demand has been made.

Order 21 rr. 3 and 4 of the RHC 1980 are relevant to the present issue. Order 21 r. 3(1) provides:

> 3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counter claim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

Order 21 r. 4 provides:

> 4. Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent for the same, or substantially the same, cause of action.

The same principle was also dealt with in *Mallal's Supreme Court Practice*, 2nd edn at p. 263, relating to O. 21 r. 4 where it states:

> Effect of the rule: Apart from any order or judgment as to costs, discontinuance of an action or counterclaim, or withdrawal of a particular claim does not prevent and is not a defence to, a further action for the same or substantially the same cause of action: The *Kronprinz* [1887] 12 App Cas 2 56. This is the same whether discontinuance or withdrawal is without leave or with leave unless in the latter case, the court under rule 3 makes an order that no further action shall be brought.

The plaintiff may therefore commence a new action for the same cause and his discontinuance of the earlier action is no defence. He need not refer to the discontinued action.

The *Rules of the Supreme Court – White Book* at p. 365 in dealing with the same issue states:

> The discontinuance of an action or the withdrawal of part of a claim without leave is not bar to a subsequent action for the same cause of action: The *Kronprinz* [1887] 12 App Cas 256, 262, where the distinction between discontinuance and dismissal is pointed out at p. 259. The effect is the same where the discontinuance is with leave, unless the order giving the leave expressly prohibits the commencement of a fresh action.

> The plaintiff may therefore commence a new action for the same cause, to which such continuance will be no defence; but unless he does it in good time, his laches may be a bar. The new action need not refer to the discontinued action, nor should it be claimed that it be treated as supplemental thereto.

The House of Lords, in the famous case of *The Owners of the Cargo of the "Kronprinz" v. The Owners of the "Kronprinz" – the Ardandhu* (1998) – House of Lords 256, in affirming the decision of the Court of Appeal, held that the agreement and order for discontinuance (upon their true construction) did not amount to a release of all claims, and that the owners of ship *"Kronprinz"* were not precluded from claiming against the fund. Lord Halsbury, at p. 260 said:

> But the question for your lordships is whether, when the bargain between the parties and the form which they adopted lead to the inference that so far as the instrument itself is concerned it was intended to leave the parties free to bring a fresh action, namely, to make this claim, your lordships are to assume that they intended that that should not be done. I am unable to come to any such conclusion. It seems to me that the plain and obvious inference which is to be drawn from this instrument is that the parties intended that which is the plain construction of the language which they have used, and as there is nothing to cut down that construction I assume that that is what they have meant; and in as much as that is the real meaning of the bargain in fact entered into between the parties appears to me that it is competent for the owners of the *Kronprinz* to make this claim.
>
> For these reasons, the matter being an extremely simple and short one, I move your lordships that this appeal be dismissed and the order of the Court of Appeal affirmed, with costs.

On the above authorities, the court holds that the plaintiff is not barred from bringing the present suit against the defendant even though the first suit against the defendant was withdrawn with the leave of court *vide* court order dated 7 January 1991. Two (2) notices of demand were issued on 4 May 1992 and 10 June 1992, and the present suit was filed on 23 November 1992. There was no inordinate delay on part of the plaintiff. The question of laches on part of the plaintiff does not arise.

Issue (f)

The defendant also contends that the defendant ought to be discharged from the guarantees pursuant to ss. 92 and 94 of the Contracts Act 1950.

Section 92 provides:

> 92. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Section 94 provides:

> 94. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

The defendant argues that the value of the securities offered by the principal borrower to the plaintiff in term of charge on fixed assets (equipments) was RM1,220,000. The equipments were 6 lorries, 4 rollers, 2 power front-end loaders, 1 back hoe, 1 stone crushing plant and 1 Mercedes Benz. The defendant claims that the plaintiff has failed to endorse their interest on the registration cards of the equipments and vehicles at the RIMV (JPJ) and the entire securities in terms of fixed assets (equipments) were lost and dissipated. Therefore the defendant claims that he is protected under ss. 92 and 94 of the Contracts Act 1950.

The court is of the view that ss. 92 and 94 of the Contracts Act 1950 do not apply to the facts of the present case because the plaintiff did not do any act which is inconsistent with the rights of the defendant. The plaintiff has already taken a registered fixed and floating charge over all the assets of the principal borrower by way of a debenture which was also created as security. (The debenture is exhibited at pp. 32-46 of the agreed bundle). The defendant, in his cross-examination, also agreed that all the assets of the principal borrower were already incorporated in the debenture. Clause 2 of the debenture provides:

> The Company as beneficial owner hereby charges by way of fixed charge all its asset including all the plant and machinery and all plant and machinery hereafter acquired by the Company together with all equipment accessories and parts pertaining thereto and by way of floating charge all its other undertaking and all its other property whatsoever and wheresoever situate kept placed or stored both present and future ...

The plaintiff's duty in the present case, was to take a registered fixed and floating charge over all the assets of the principal borrower and accordingly a debenture was created as security. Since there is a debenture, covering all the assets and equipments of the principal borrower, there is no need for the plaintiff to endorse its interest on the equipments registration cards with the RIMV (JPJ) as this is not a hire-purchase transaction. The plaintiff's interest is already protected under the debenture.

The defendant at the material times was the general manager of the principal borrower. If at all the equipments were lost or dissipated, the defendant is also to be blamed as the principal borrower was at all material times in possession of all the equipments, and not the plaintiff. The plaintiff did not in any way sacrifice or impair any security by neglect or default or, did not dissipate the assets of the principle borrower. The plaintiff has done everything within its means to recover the outstanding sum from the principal borrower. The plaintiff could not obtain any payment from the debenture. This can be seen from the receivers' report. The receivers were appointed under the debenture.

According to para. 8 of the receivers' report, the amount owing under the debenture was RM2,465,905.49 and pursuant to para. 9 of the report, the estimated value of all the assets of the principal borrower was NIL. The defendant agreed to this report in his cross-examination.

Clauses 2 and 5 of the guarantees preclude the defendant from raising this issue. Clause 2 provides:

> As security now or at any time held by you shall be created as securities for the said general balance and other amount owing, I/we will make no claim to such securities or any part thereof or any interest therein unless and until I/we have paid all moneys due from me/us under this guarantee and you shall have received the full amount of such general balance and other amount if any.

Clause 5 provides:

> This guarantee shall be without prejudice to and shall not be affected nor shall/we or any of us be released or exonerated by any of the matters following:
>
> (i) any securities negotiable or otherwise including other guarantees which you may now or any time hereafter hold from the Customer or any other person or persons in respect of any money hereby guaranteed; and
>
> (ii) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specialty or other security or instrument negotiable or otherwise and whether satisfied by payment or not.

On the above considerations the court is satisfied and holds that ss. 92 and 94 of the Contracts Act 1950 are not applicable and therefore, the defendant is not discharged from his liability under the guarantees.

Issue (g)

Finally, the defendant raised the issue that the plaintiff has failed to prove the proper amount of its claim against the defendant. The defendant claims that there is no valid basis for the total claim of RM3,375.354.98 against the defendant because, firstly the account had been debited and computed even before the release of the guaranteed facility and secondly interest had been computed on a compound basis in contravention of the terms of the guarantees and s. 11(a) of the Civil Law Act 1956.

This issue was only raised at the stage of submissions made by counsel for the defendant. In his cross-examination the defendant agreed that he has never complained to the plaintiff about the amount claimed nor at any time before the present suit was filed. He also agreed that he never complained about the statement of account to the plaintiff. It is also in evidence that the defendant never questioned the plaintiff about the account even after the notice of demand was made to him.

The defendant also has failed to plead in his statement of defence that he challenged the statement of account. If the defendant genuinely wished to raise contentions as to the correctness of the amount claimed or the correctness of the statement of account, he should have questioned them at any time before the suit. Even during the suit, he could have demanded for further and better particulars on the account.

The plaintiff denies that the account was debited even before the facilities were released. According to PW1, there are (3) accounts involved in this case, namely:

(i) Overdraft 1, account No 55-5364 for an amount of RM367,000;

(ii) Overdraft 2, account No 55-5412 for an amount of RM119,000; and

(iii) Fixed loan, account No 241-1138 for an amount of RM282,000.

The principal borrower first applied for the facilities on 2 August 1972. Then the plaintiff took (2) securities namely a debenture dated 20 August 1977 and a legal charge dated 10 October 1977. The principal borrower also entered into an agreement on 6 October 1977 and purchased RM225,004 worth of assets from Southern Construction & Agencies. This RM225,000 worth of assets forms part of the security given to the plaintiff. Then the amount RM367,000 (for

overdraft 1) was released progressively to the defendant from August 1977. Later the fixed loan of RM282,000 was released on 6 August 1978. Then the defendant guarantees dated 16 December 1978 (as seen in pp. 51-58 of the agreed bundle). These are continuing guarantees. When referred to all these securities during cross-examination, the defendant remained silent and when asked whether he ever complained or protested about the facilities being released before security documentation was completed, the defendant answered "Not that I know of."

The principal borrower had enjoyed all the overdraft facilities and had asked the plaintiff for additional funds. All these can be seen from the letters written by the defendant himself to the plaintiff at pp. 11-13, 21-31, 47-50 and 62-80 of the agreed bundle. The defendant also had carefully avoided to mention that the loan (overdraft 1) was in fact released earlier. Now he cannot come to court and say that the account was debited even before the fixed loan of RM282,000 was released. The defendant is an educated man having qualifications as a public accountant.

At all material times, he was the general manager or the finance director of the principal borrower. He could not have signed the guarantees without knowing that the guarantees were for continuing facilities as well for the facilities that have been released.

The fixed loan of RM282,000 has been credited into the overdraft 1 account No 55-5364, converting it into an overdraft. The defendant had full knowledge of this arrangement and never objected. Being an overdraft account, compound interest can be charged. This principle was laid down by the Federal Court in *Malayan Banking Berhad v. Foo See Mooi* [1981] 2 MLJ 17 where Chang Min Tat FJ held:

> In *Yournell v. Hibernian Bank*, Lord Atkinson described the practice of bankers in debiting interest to an overdraw current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical "rests", as "a usual and perfectly legitimate mode of dealing between banker and customer", though it meant securing for the bank benefit of compound interest. *Paget on Banking*, 8th edn at p 133 justifies it thus:
>
> There is no common law right to charge even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim. Such acquiescence will justify the charging of compound interest or interest with periodical rests, so long as the relation of banker and customer

> exists, and the relationship is not changed into that of mortgage and mortgagor. The taking of a mortgage or a charge by way of legal mortgagee to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest.

In the present case, it is a universal custom of bankers to charge compound interest on an overdraft facility granted to the customer. The principal debtor, as a customer has acquiesced to the system under which compound interest is charged. As has been stated in the above Federal Court's case, "such acquiescence will justify the charging of compound interest, so long as the relation of banker and customer exists". The defendant at all material times as general manager or finance director of the principal borrower never queried or confronted the plaintiff on the issue of compound interest before. As such, the court is satisfied that the total claim of RM3,375,354.98 is correct and valid and in the light of the above Federal Court's decision in *Foo See Moi*'s case there is no contravention of the terms of the guarantees or s. 11(a) of the Civil Law Act 1956.

On the same issue, the defendant also complained that the plaintiff has failed to produce the ledgers for a period of (2) years from 28 December 1979 to 31 December 1982 on the ground that they were missing. The defendant also complained that the plaintiff has not produced any secondary documents for the relevant two year period.

The court is of the view that the missing original ledgers for the two year period does not in any way affect the plaintiff's case as the summary accounts of those ledgers have been tendered in court as 1D3-F. These ledgers and the summary of the accounts are ordinary books of the bank and all the entries are made in the usual and ordinary course of business and they are kept in the custody and control of the bank. PW1 confirms that the copies of accounts which are *prima facie* evidence have been examined with the original entries and are correct. The summary of accounts in the present case are admissible in evidence by virtue of ss. 4 and 5 of the Bankers Book (Evidence) Act 1949 which provides as follows:

> 4. (1) A copy of an entry in a bankers book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

5. (1) A copy of an entry in a bankers book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

Further, PW2, the person who keeps or is the custodian of the ledgers and accounts and PW1, have given evidence that they had mounted search and done everything within their means to locate the original ledgers for the two year period but failed to locate them. They also said that the original ledgers could have gone missing because the plaintiff had shifted places many times in the last 20 years and this is a very old case as the loan has been granted in the 1970's. Therefore the court is satisfied that the summary of accounts as tendered by the plaintiff and confirmed by PW1 that they were examined with the original entry which had gone missing and lost, and found to be correct, are admissible in evidence by virtue of s. 65(1)(c) and (2)(a) of the Evidence Act 1950 as well as under ss. 4 and 5 of the Bankers Book (Evidence) Act 1949. The plaintiff has satisfied the requirements of the Bankers Book (Evidence) Act 1949 and applying s. 65(2)(a) of the Evidence Act 1950 the secondary evidence of the contents of the summary account are admissible and PW1 and PW2 have also testified in court that the summary accounts tendered in court are reflections of the ledgers including the missing ones.

Conclusion

Based on all the above premises and the evidence before the court as well as the authorities referred to, it is clear that the defendant has no defence at all to the plaintiff's claim. Therefore the court holds that the plaintiff's claim against the defendant as prayed in the statement of claim is allowed with costs.